IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

WRIT PETITION NO. 2581 OF 2006

Kuwait Airways Corporation. ...Petitioner.

V/s.

Kuwait Airways Corporation
Employees & Others. ... Respondents.

Mr. J.P. Cama, Senior Counsel with Mr. Rajiv Bhatia for the Petitioner.

Mr. Rahul Nerlekar for Respondent No.1

.....

CORAM : DR. D.Y. CHANDRACHUD,J.

9TH OCTOBER, 2006.

P.C. :

1. The Industrial Tribunal by its Award in a Reference to adjudication granted re-instatement with full back wages to the workmen whose cause was espoused by the first Respondent.

2. The workman, Shri Ashok D. Bherwani, was appointed initially as an Accounts Clerk by the Petitioner on 18th June 1976. On 3rd December 1998, a notice to show cause was issued to the workman in relation to his alleged involvement in the commission of certain irregularities. The workman submitted his reply on 10th December 1998. A letter of termination was issued on 15th January 1999. Notwithstanding the letter of termination, the workman was continued in service. On 1st March 1999, a fresh order of

termination was issued to the workman and he was discharged from service. At the time of his termination, the workman was holding the post of Senior Accounts Officer. The dispute was taken into conciliation and eventually a reference was made to adjudication before the Central Government Industrial Tribunal. The Tribunal passed an Award on 6th February 2006 granting re-instatement with full back wages.

3. Two submissions have been urged on behalf of the Petitioner in these proceedings. The first submission is that the Petitioner had questioned the status of the employee as a workman under Section 2(s) of the Industrial Disputes Act, 1947. On behalf of the Petitioner, it has been submitted that the Tribunal applied a wrong test in law in coming to the conclusion that the burden was on the Petitioner to prove that the employee is not a workman. Moreover, it was submitted that the Tribunal has erroneously proceeded on the basis that the employee was a workman merely because there was nothing to show that he was carrying out duties in a managerial capacity or that he was working as a supervisor. Moreover, it was submitted that the nature of the duties upon which reliance has been placed by the Tribunal would not demonstrate that the work that has been rendered was of a clerical nature. The second submission that has been urged is that in any case even if the Tribunal were to hold that the employee was a workman, an opportunity ought

to have been granted to the management to prove the case of loss of confidence. The Tribunal, it was submitted, erred in declining to do so in the present case. The allegation was that the workman had committed irregularities by issuing 91 tickets illegally causing a monetary loss to the Corporation.

4. On behalf of the first Respondent on the other hand it has been submitted that though the workman had deposed in evidence in support of his case the management did not lead any evidence and the view of the Tribunal to the effect that the duties that were rendered were of a clerical nature is borne out by the evidence on record. Secondly, it was submitted that since no charge-sheet has been issued by the employer, there was no question of the Tribunal granting an opportunity to lead evidence in support of the charge of misconduct. These submissions now warrant consideration.

5. Section 2(s) of the Industrial Disputes Act, 1947 contains a statutory definition of the expression "workman". The expression "workman" is defined by the substantive part of the section to mean any person employed in an Industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. The subsequent part of the definition provides that the expression does not include a person who falls within the purview of sub-clauses (i) to

(iv) thereof. Among the exceptions is a person who is employed mainly in a managerial or administrative capacity or, who being employed in a supervisory capacity draws wages in excess of Rs.1,600/- per month or exercises either by the nature of the duties attached to the Office or by the reason of the powers vested in him, functions mainly of a managerial nature.

6. A Constitution Bench of the Supreme Court has held in **H.R. Adyanthaya V/s. Sandoz (India) Ltd. and Ors. 1994 II CLR 552 SC**, that it is not sufficient to demonstrate that an employee does not fall within any of the exceptions laid down in Section 2(s). In other words, it is necessary, in order for an employee to be a workman under Section 2(s) that the nature of the duties and functions cast upon him fall within the purview of the work which is specifically provided for in the first part of the definition. The Supreme Court held as follows :-

> " Hence the position in law as it obtains today is that a person to be a workman under the I.D. Act must be employed to do the work of any of the categories viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation."

7. In **Mukesh K. Tripathi V/s. Senior Divisional Manager, LIC and Ors. 2004 III CLR 534,** the Supreme Court

held that the onus to establish that an employee is a workman lies on the employee and it is for him to establish that the work which is rendered falls within the substantive part of the definition in Section 2(s). The Supreme Court held as follows :-

> " From a perusal of the award dated 28.5.1996 of the Tribunal, it does not appear that the Appellant herein had adduced any evidence whatsoever as regard the nature of his duties so as to establish that he had performed any skilled, unskilled, manual, technical or operational duties. The offer of appointment dated 16.7.1987 read with the scheme clearly proved that he was appointed as an apprentice and not to do any skilled, unskilled, manual, technical or operational job. The onus was on the appellant to prove that he is a workman. He failed to prove the same."

8. Again in a subsequent part of the decision, the Court held thus :-

> " A 'workman' within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 must not only establish that he is not covered by the provisions of the Apprenticeship Act but must further establish that he is employed in the establishment for the purpose of doing any work contemplated in the definition."

9. In the present case, the approach of the Industrial Tribunal would be evidenced from the following extract from the award :-

> " The burden lies upon the Corporation to prove that the employee is not a workman. Nothing is shown on record to discharge this burden by the Corporation. Contrary

> to it, it is argued that the burden lies upon the employee to prove that he is a workman which is not correct. Considering the duties performed by the employee and keeping in mind all the rulings cited before me, referred to above, I conclude that it is a clear case in which there is nothing to show that the employee was discharging mainly the duties in the managerial capacity or that he was working as supervisor."

10. The Tribunal was manifestly in error in holding that the burden was on the employer to prove that the employee is not a workmen. This statement of law is directly in the teeth of the principle laid down by the Supreme Court in **Mukesh Tripathi's** case. Moreover, the Tribunal proceeded on the basis that there was nothing to show that the employee was discharging mainly duties of a managerial nature or that he was working as a supervisor. In so far as this aspect is concerned, as the Constitution Bench held in **Adyanthaya's** case (supra) it is not enough to establish that the employee does not fall within any of the exceptions contained in sub-clauses (i) to (iv) of Section 2(s). The substantive nature of his duties must be those which are provided for in the definition.

11. Undoubtedly, one of the other circumstances which is required to be borne in mind is the fact that it was only the workman who has adduced evidence and that no evidence was adduced on behalf of the employer. However, this does not dilute the requirement to establish that the nature of the duties of the employee must be those which

are specifically spelt out in Section 2(s). In paragraph 7 of the award, the Tribunal has adverted to the duties which were being performed by the workman and those are said to be follows :-

"(i) He was signing cheques issued by the first party to 3rd parties.

(ii) Had custody of cash.

(iii) Authority to sign salary cheques.

(iv) Signing Trial Balance of the First Party.

(v) Signing Bank Reconciliation statements.

(vi) Custody of the Safe Keys.

(vii) Deposit of FTT to the Govt. Treasury.

(viii) Assistance in preparation of the Budget for the Mumbai Office.

(ix) Overseeing of the distribution of tickets both at the Airport Office and the Sales Counter.

(x) Initialing the Pay slip showing the deposits in the Chairman's Accounts deposited by the First Party with the Bank.

(xi) Preparation and signing of Asset Inventory.

(xii) Ensuring that closing of Accounts were done on time.

(xiii) Control of Suspense accounts.

(xiv) Prompt action in respect of the Debit Note.

(xv) Recommendation of leave.

(xvi) Nobody was working senior to him in the higher grade at Mumbai Station.

12. The Tribunal held that as a matter of fact the duty mentioned in (xv) was not to be performed by the employee since he was not required to recommend the leave

of other employees. Counsel appearing on behalf of the Petitioner has, however, drawn the attention of the Court to the specific admission of the workman that he used to recommend leave of the staff of the Accounts Department. On behalf of the Petitioner, reliance has been placed on the Judgment of the Supreme Court in **The Management of M/s. Sonepat Co-operative Sugar Mills Ltd. V/s. Ajit Singh, 2005 II CLR 66, SC** wherein it was held that the job of a clerk ordinarily implies stereotyped work without power of control, dignity, initiative or creativeness. In the present case, it was submitted that the duties which have been adverted to in paragraph 7 of the Judgment of the Tribunal cannot be regarded by any means as being stereotyped without any power of control or initiative. In my view, a fresh look at the evidence by the Tribunal is warranted for more than one reason. Firstly, the Tribunal has applied itself to a wrong test in law which is not consistent with the law laid down by the Supreme Court. Secondly, even on the question as to whether the duties that have been performed were of a clerical nature, it was necessary for the Tribunal to consider the entire evidence on record including some of the admissions which have been elicited in the cross-examination. In order to facilitate a fresh adjudication by the Tribunal, it will not be appropriate to express any final opinion on the nature of the work that was required to be performed by the employee in the present case, since it would be appropriate that it be decided on merits by the Tribunal.

13. On the second aspect of the matter also, I am of the view that the Tribunal ought to have furnished the Petitioner an opportunity to lead evidence in support of the alleged misconduct even if it came to the conclusion that the employee was a workman within the meaning of the provisions of Section 2(s). The order of termination is on the ground of a loss of confidence. In **Chandu Lal V/s. Pan American World Airways (1985) 2 SCC 727,** the Supreme Court held that the plea of loss of confidence casts a stigma on the employee. With the decision in **Chandu Lal** (supra) an accompanying Appeal was heard by the Supreme Court in **Kamal Kishore Lakshman V/s. Pan American World Airways, (1987) 1 SCC 146.** In that case also as in the present case no domestic enquiry had been held. The Labour Court allowed the parties to lead evidence and having considered the entire evidence came to the conclusion that the action of the management was valid since it had been pursued on the ground that there were grave allegations against the workmen. The Supreme Court held thus :-

> " The legal position firmly established it that if there has been no appropriate domestic enquiry or no enquiry at all before disciplinary action is taken, it is open to the employer to ask for such opportunity in the course of adjudication. In the facts of this present case, the order of separation grounded upon loss of confidence has been justified before the Labour Court and the Labour Court has come to that conclusion upon assessment of the evidence."

14. The Supreme Court held that if the termination was founded upon stigma, as would be the case when it was based on a loss of confidence and a disciplinary enquiry has not preceded the passing of the order of termination, the order would be justified, where the employee is a workman, in the course of adjudication before the Tribunal under the Industrial Disputes Act, 1947. The Supreme Court held as follows :-

> " Whether termination is grounded upon stigma would vary from case to case depending upon whether it involves a government servant or a workman. But the procedural safeguards appear to be different when termination is sought to be founded upon stigma. If disciplinary inquiry has not preceded the prejudicial order in the case of a government servant the action would be bad while in the case of a workman the order could be justified even in the course of adjudication before the appropriate Tribunal under the Industrial Disputes Act even though no inquiry had been undertaken earlier."

15. In view of the aforesaid principle of law laid down by the Supreme Court, there is merit in the second contention that has urged on behalf of the management. Even if the Tribunal were to hold that the employee was a workman, an opportunity ought to have been granted to the management to lead evidence to substantiate its action.

16. In these circumstances, I am of the view that an order of remand is warranted for the Tribunal to consider the matter afresh in the light of the observations contained in this order. In order to facilitate a fresh order upon remand, the award of the Tribunal dated 6th February 2006 is quashed and set aside. Upon remand, parties shall appear before the Tribunal for receiving directions on 13th November 2006. The Tribunal is requested to expedite the disposal on the remand preferably within a period of 6 months subject to the exigencies of its work.

17. The Petition is disposed of in these terms. There shall be no order as to costs.